Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1801

UNITED STATES OF AMERICA

versus

ELMER GARY RITTER,

Petitioner

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Middle District of Louisiana

By: BRYAN E. BUSH, JR.
407 Taylor Building
251 Florida Boulevard
Baton Rouge, Louisiana 70801
Telephone: (504) 344-9495

Attorney for Petitioner

Franklin Press, Inc. Baton Rouge, La.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. ____

UNITED STATES OF AMERICA

versus

ELMER GARY RITTER,

Petitioner

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Middle District of Louisiana

---

MAY IT PLEASE THE COURT:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered and entered on the 23rd day of March,

1978, in United States of America versus Elmer Gary Ritter, Number 77-5286 on the Docket of said Court and the refusal of petitioner's application for rehearing an entry of said judgment on the 26th day of May, 1978, affirming the decision of the United States District Court of the Middle District of Louisiana, bearing Criminal Number 76-107 on the docket of said court. The decision of the United States Court of Appeals for the Fifth Circuit is not reported at this time but said decision is appended hereto. Petitioner filed a petition for a Stay of Mandate with the Court of Appeals for the Fifth Circuit on the 25th day of May, 1978, but said Court refused to stay the Mandate pending application for Writ of Certiorari to this Honorable Court. Petitioner has until the 23rd day of June, 1978 to file his application for Writ of Certiorari to this Honorable Court.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC 1254 (1) and 28 USC 1651 (a), petitioner requesting a review of a decision of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

I. Should a court invoke the "ejusdem generis" rule of statutory construction when applying the omnibus clause of 18 USC 1503 to an attempted sale of secret Grand Jury testimony?

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. 18 USC 1503

"Influencing or injuring officer, juror or witness generally.——

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

2. 18 USC 401

"Power of court. —

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. Rule 6(e), Federal Practice and Procedure

"(1) **General rule.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court." —

"(2) **Exceptions.**

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to:

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

"(3) **Sealed indictments.** The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defen-

dant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons."

4. 18 USC 371

"Conspiracy to commit offense or to defraud United States—

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT OF THE CASE

On May 10, 1976, the regular grand jury for the Middle District of Louisiana was legally and properly empaneled for a four-month term. During the course of its original four-month term, the grand jury began an investigation of various matters relating to the financial affairs of Roger J. LeBlanc and Jules B. LeBlanc, III. In the course of this term, the grand jury heard numerous witnesses and received numerous records. On August 21, 1976, the grand jury was extended to

December 31, 1973 to continue the above described investigation. On October 1, 1976, the grand jury met and heard the testimony of nine witnesses in connection with that investigation. (Appendix-70.)

On the 15th day of October, 1976, Elmer Gary Ritter and Herbert A. Howard were arrested by Federal authorities and charged with selling transcripts of the testimony of witnesses who had testified before the Federal grand jury on October 1, 1976.

On October 26, 1976, Elmer Gary Ritter and Herbert A. Howard were indicted by the grand jury in a three-count indictment of having violated several Federal criminal statutes. Count I accused them in essence of conspiring to commit an offense against the United States in violation of 18 USC 1503 in that they conspired with Roger J. LeBlanc, Jules B. LeBlanc, III, Ron Johnson and George Davis, unindicted co-conspirators, to corruptly endeavor to influence, obstruct and impede the due administration of justice by offering to sell to Jules and Roger LeBlanc for $11,000.00 information contained in the transcripts and taped recordings of testimony of witnesses that had appeared before the Federal Grand Jury on October 1, 1976. The ten overt acts alleged in the indictment in furtherance of the conspiracy set out the details of the occurrences which led to the indictment. Petitioner and the government stipulated that none of the co-conspirators had threatened, contacted, harmed or endeavored to threaten or harm any grand juror, witness or officer of the court in his person or property; that petitioner had in fact never contacted any officer of the court, grand juror, or witness. Count I was a conspiracy count whereas Counts II and III were other accusa-

tions against the two defendants arising out of the same alleged circumstances.

On January 14, 1977, as a result of the above described investigation, the grand jury returned a criminal indictment, No. 77-11, charging Jules B. LeBlanc, III, Roger J. LeBlanc, and Howard Toler Hatcher with various felony offenses involving Federal banking laws. (Appendix-71.)

Howard's and Ritter's motions to dismiss the October 26, 1976 indictment, based on the failure of the government to state facts sufficient to constitute an offense, were on January 19, 1977 denied by the district judge. (Appendix-48.)

Howard and Ritter waived their right to a jury trial, and after a bench trial they were on March 8, 1977 found guilty as charged as to Count I of the indictment. Counts II and III of the indictment were dismissed by the government. (Appendix 177, 247.)

On April 15, 1977, petitioner, Elmer Gary Ritter, was sentenced to three years imprisonment and Herbert A. Howard to four years imprisonment, with the execution of the sentence being suspended pending appeal. On April 25, 1977, petitioner filed a notice of appeal with the trial court which in due course was perfected to the United States Court of Appeal for the Fifth Circuit. (Appendix-265, 273.)

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the trial court on March 23, 1978. Ritter petitioned for a rehearing but said petition was denied by the United States Court of Appeals for the Fifth Circuit on May 24, 1978. Petitioner then filed a Motion for a Stay of

Mandate which motion was denied by the United States Court of Appeals for the Fifth Circuit on June 2, 1978.

ARGUMENT

I. SHOULD A COURT INVOKE THE "EJUSDEM GENERIS" RULE OF STATUTORY CONSTRUCTION WHEN APPLYING THE OMNIBUS CLAUSE OF 18 USC 1503 TO AN ATTEMPTED SALE OF SECRET GRAND JURY TESTIMONY?

The Fifth Amendment to the U. S. Constitution requires that no citizen shall be deprived of life, liberty or property without due process of law.

The Sixth Amendment to the U. S. Constitution requires that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation lodged against him.

Due process requires that a citizen accused of crime shall be fully apprised of the nature and the cause of the charge lodged against him. The Fifth and Sixth Amendments must be read together. *U.S. v. L. Cohen Grocery Co.*, 255 U. S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045 (1921).

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of "due process of

law." *Connally v. General Construction Co.*, 269 U. S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1925).

The Sixth Amendment is a reaffirmation of the essential principles of the common law. The Sixth Amendment puts it beyond the power of either Congress or the judiciary to abrogate an accused citizen's rights. It follows, as a matter of course, that the effect of the Sixth Amendment commences with the statutes fixing or declaring offenses. As to those statutes, the Sixth Amendment insures the general rule of the common law that the statutes are not to be construed to embrace offenses which are not within their intention and terms. This does not mean that all the elements of a crime must be set out in the statute on which the prosecutor relies. Nor that the statute may not create an offense by the use of inapt or imperfect phraseology. But the elements of an offense must be in some way declared by the legislative power and cannot be constructed by the courts from any supposed intention of Congress which the statute fails to state. *U. S. v. Potter*, 56 F. 83 (1st Cir. 1892), reversed on other grounds, 15 S.Ct. 144, 155 U. S. 438, 39 L.Ed. 214.

The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense the nature of which the statute does not define and hence of which it gives no warning, *Screws v. U. S.*, 325 U. S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495, 1503 (1945).

Section 1503 of Title 18 originated with the Act of March 2, 1831, 4 Stat. 487. The 1831 Act was intended to be "declaratory of the law concerning contempts of court." The power of the U. S. courts to punish contempt "in any cause or hearing before the same" had been recognized earlier by the

Judiciary Act of 1789, 1 Stat. 83. Section 1 of the 1831 Act involved misbehavior occurring in the presence of courts "or so near thereto, as to obstruct the administration of justice." Section 2 of the 1831 Act, the predecessor of 18 USC §1503, proscribed contempts occurring beyond the presence of courts which would be punishable by indictment and trial and all the safeguards attendant thereto. *U. S. v. Essex*, 407 F.2d 214 (6th Cir. 1969) at 216.

Section 1 of the 1831 Act provided the contemnor could be punished summarily if his conduct amounting to contempt of court occurred in the presence of the court. *Id*, at 217.

Section 2 of the 1831 Act provided that if contemptuous conduct influencing or injuring any officer, juror or witness in particular occurred away from the court then the offender was to be dealt with by indictment. *Id*, at 217.

The principal distinction between Sections 1 and 2 of the 1831 Act, aside from added procedural safeguards under Section 2, was geographical. They both proscribed contemptuous conduct, i.e., obstruction of court proceedings. *Id*, at 217.

See also: *Nye v. U. S.*, 313 U.S. 33, 85 L.Ed. 1172, 61 S.Ct. 810 (1941).

Sections 1 and 2 of the 1831 Act are now part of our present statutory scheme. Section 1 is 18 USC §401 which condemns obstructive acts in the court's presence. Section 2 is 18 USC §1503, which prohibits contemptuous conduct away from the court. *Id*, at 217.

Section 1503 as it appears today prohibits all citizens from:

(1) Endeavoring to influence, intimidate or impede any witness, grand or petit juror or court officer in the discharge of his duty, either (a) corruptly, (b) by threats or force, or (c) by threatening letter or communication; or injuring any party or witness, grand or petit juror or court officer, by any one of the same means (a), (b) or (c) described above; and from

(2) Influencing, obstructing or impeding the due administration of justice by (a), (b) or (c) above; or endeavoring to influence, obstruct or impede the due administration of justice by (a), (b) or (c) above. The second sub-part is frequently referred to as the "omnibus" clause.

The title or headnote of 18 USC 1503 reads: "INFLUENCE OR INJURING OFFICER, JUROR, OR WITNESS GENERALLY" and the specific acts denounced by said statute cover various activities aimed at interfering with the due administration of justice.

The Court in *U. S. v. Solow*, 138 F.Supp. 812, 814, interpreted 18 USC 1503, as follows:

> "Section 1503 of Title 18 denounces various activities aimed at interfering with the due administration of justice. It condemns one who (1) corruptly, or by threats, force, threatening letter or communication, endeavors to influence, intimidate, or impede a witness, juror or officer; (2) injures (a) any party or witness on account of his attending or testifying in any proceeding enumerated in the statute; (b) any juror on account of any verdict or indictment assented to or participated in by him; (c) any officer, commissioner, or other committing magistrate on account of the official performance of his

> duties. These provisions bring within their reach those who seek to obstruct the administration of justice by efforts upon witnesses, jurors or officers."

The above quoted provisions of *U. S. v. Solow* (Supra) hold true even though the Court found that under the facts of the Solow case there had been a violation of 18 USC 1503.

Following the specific prohibited acts we find what courts have referred to as the omnibus clause which reads as follows:

> ". . . CORRUPTLY OR BY THREATS, OR FORCE, OR BY ANY THREATENING LETTER OR COMMUNICATION, INFLUENCES, OBSTRUCTS, OR IMPEDES, OR ENDEAVORS TO INFLUENCE, OBSTRUCT OR IMPEDE THE DUE ADMINISTRATION OF JUSTICE shall be fined not more than $5,000.00 or imprisoned not more than five years or both."

The specific enumerated acts preceding the phrase, "due administration of justice," in 18 USC 1503 is qualified and limited by the enumeration of specific judicial functions concerned with the administration of justice in the preceding portion of the statute. This interpretation of the omnibus provision of 18 USC 1503 has been rendered by the courts in the following cases:

Haili v. United States (9th Circuit Court of Appeal 1958) 260 F.2d 744;

United States v. Essex (6th Circuit Court of Appeal) 407 F.2d 214;

United States v. Metcalf (9th Circuit Court of Appeal) 435 F.2d 754;

United States v. Ryan (9th Circuit Court of Appeal 1972) 455 F.2d 728;

United States v. Knife, 371 F.Supp. 1345.

In the five above cases cited from the 9th and 6th Circuit Courts of Appeal, the Courts applied the "ejusdem generis" rule of statutory construction to 18 USC 1503 in that the general words which follow specific words in the enumeration of prohibited acts must be construed to embrace "only" acts similar in nature.

In the case of *Morisett v. United States*, 342 U.S. 246, 72 Sct. 240 (1951), the Supreme Court specifically held that the Federal judiciary should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.

In *United States v. Metcalf*, 435 F.2d 754, 757 (9th Circuit 1970) in commenting on the meaning of the omnibus clause the court said:

> "Moreover, the general provision, although it refers to the broad range of 'due administration of justice,' (1) prohibits only specified types of impending acts . . . i.e., by threats or force, or by threatening letter or communication.' Thus not only must the broad term 'due administration of justice' be limited to pending judicial proceedings, but also the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions. This conclusion would appear necessarily to follow from the proposition that Section 1503, since it is a criminal statute, must be, and should be, construed narrowly so that it can be upheld against the

> charge of vagueness. *United States v. Scoratow*, 137 F. Supp. 620 (W.D.Pa. 1956)."

In the instant case, Count I and the ten overt acts fail to allege that any contact or endeavor to contact was made by petitioner of any witness, juror or participants in a pending grand jury investigation. The indictment, stipulations and testimony of all witnesses agree that no contact or endeavor to make such contact was made by petitioner or any of the unindicted co-conspirators which negates any criminal intent required to endeavor to violate 18 USC 1503.

Count I of the indictment does not allege that Ritter and Howard conspired to violate the first sub-part of 18 USC 1503 but that they conspired in an effort corruptly to endeavor to influence, obstruct and impede the due administration of justice in the Middle District of Louisiana. This together with the stipulations by the government and defendant brings the inquiry solely to a possible violation of the omnibus clause of 18 USC 1503, i.e., that defendants conspired to influence, obstruct or impede the due administration of justice. The omnibus clause standing alone cannot be said to properly advise a person of the conduct it attempts to prohibit. To pass constitutional muster the first subpart, which alleges specific acts must be looked to when interpreting the omnibus clause of 18 USC 1503. The Fifth and Sixth Amendments require that no citizen be forced to speculate as to the meaning of penal statutes. All of this Nation's citizens are entitled to be informed as to what the sovereign commands or forbids. Indeed, as a criminal law, the federal obstruction of justice statute requires strict construction. *U. S. v. Essex*, id., at 218. Of course, the same is actually said of any federal criminal statute.

Ritter was not accused of injuring or endeavoring to influence, intimidate or impede any court participant (party, witness, juror or court officer): The accusation comes under the 1503 "omnibus" (really "catch-all" or "fish-net") clause—that Ritter conspired to corruptly endeavor to influence, obstruct and impede justice. No force, threat or threatening letter is alleged.

Can Congress have proscribed conduct any more vague than that?

Conspired to endeavor. Double dilution. Conspired to endeavor to influence, obstruct and (not: "or") impede justice.

Ritter is supposed to know ("ignorance of the law is no excuse") that he is not supposed to get together with others, 18 USC §371 [the conspiracy statute], with a view in mind of trying to keep justice from triumphing. 18 USC §1503. He is supposed to know that he can't engage in a conspiracy "corruptly to endeavor to impede, obstruct and influence the due administration of justice" by copying and selling secret grand jury materials.

But the statute cannot be so broadly construed. It would be vague if it were. It is designed to achieve the twin goals of protecting the participants in a specific federal proceeding and of preventing a miscarriage of justice in a case pending in a federal court. *U. S. v. Metcalf*, 435 F.2d 754 at 756 (9th Cir. 1970). Interfering with witnesses, jurors and parties operates to bring about a miscarriage of justice in specific cases. Although the closing general "omnibus" provisions of Section 1503 refer to a broad range of "due administration of justice," those "omnibus" provisions prohibit only specified

types of impeding acts—i.e., "by threats or force, or by threatening letter or communication." Thus, not only must the broad term "due administration of justice" be limited to pending judicial proceedings, but also the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions. This conclusion would appear necessarily to follow from the proposition that Section 1503 as a criminal statute must be and should be construed narrowly so that it can be upheld against the charge of vagueness. *Id.* at 757.

Statutes are unconstitutionally vague and indefinite, likely to catch within their nets citizens who have no means of obtaining prior notice that their conduct is proscribed, when such statutes:

(1) Prohibit attempts to control the cost of any article above its "real value," construed to mean "market value under fair competition and under normal market conditions," *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 S.Ct. 853, 58 L.Ed. 1284 (1914);

(2) Provide it unlawful willingly to make any "unjust or unreasonable rate or charge" in handling or dealing with necessaries, *U. S. v. L. Cohen Grocery Co.*, id;

(3) Require payment to state employees at the "current rate" of per diem wages in the "locality" where the work is performed, *Conally v. General Construction Co.*, id;

(4) Prohibit associations from marketing at a "reasonable profit" those products which could not otherwise be so marketed, *Cline v. Frink Dairy Co.*, 274 U. S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); and

(5) Prohibit being a "gangster," defined as being any person who is not engaged in any lawful occupation, who is "known to be a member of any gang consisting of two or more persons," and who has been convicted of a crime or at least three times of being a "disorderly person," *Lanzetta v. New Jersey*, 306 U. S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939).

In the court below both Howard and Ritter raised the issue of the possible vagueness of 1503 in response to the magistrate's report recommending dismissal of their motions to dismiss. Appendix-35, 38.

The only provision which seems to logically cover the selling of secret Grand Jury testimony is Rule 6(e) of the Federal Rules of Criminal Procedure, but the government chose not to so charge in the instant case.

CONCLUSION

In conclusion, it is respectfully requested that a Writ of Certiorari be granted and after due consideration, a judgment of acquittal be entered in favor of petitioner, Elmer Gary Ritter.

Respectfully submitted:

By:

BRYAN E. BUSH, JR.
407 Taylor Building
251 Florida Boulevard
Baton Rouge, Louisiana 70801
Telephone: (504) 344-9495

CERTIFICATE

I hereby certify that a copy of the Petition for Writ of Certiorari filed on behalf of petitioner, Elmer Gary Ritter, has this day been served on the following by depositing same in the United States mail, postage prepaid:

1. United States Court of Appeals for the Fifth Circuit

2. United States District Court for the Middle District of Louisiana

3. Mr. Donald L. Beckner
   United States Attorney for the
   Middle District of Louisiana
   707 Florida Street, Room 130
   Baton Rouge, Louisiana 70801

Baton Rouge, Louisiana, this ——— day of June, 1978.

BRYAN E. BUSH, JR.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 77-5286

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ELMER GARY RITTER,

Defendant-Appellant

Appeal from the United States District Court for the Middle District of Louisiana

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March 23, 1978

Before INGRAHAM, GEE and TJOFLAT, Circuit Judges.

JUDGMENT

Defendants were convicted before the United States District Court for the Middle District of Louisiana, at Baton Rouge, E. Gordon West, J., of conspiring to obstruct the due administration of justice, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) statute prohibiting obstruction of due administration of justice covered defendants' attempt to sell transcripts of secret grand jury testimony; (2) since omnibus clause of statute clearly proclaimed that all obstructions of justice are prohibited, statute gave fair notice of offending conduct, and (3) question was not whether defendants' actions had any ultimate effect on out-

come of grand jury investigation but was whether they disturbed procedure of the investigation

Affirmed.

1. Obstructing Justice key 1

Whatever can be accomplished through intimidating or influencing a witness, juror or court official constitutes obstruction of justice since each of the actors has certain duties imposed by law and interference with his performance of these duties necessarily disrupts the processes of the criminal justice system; the same interference can occur despite absence of any personal contact with a juror, witness or official. 18 U.S.C.A. § 1503.

2. Obstructing Justice key 6

Violating secrecy of grand jury proceeding by selling transcripts of confidential grand jury testimony came under statutory omnibus clause which prohibits influencing, obstructing or impeding due administration of justice and which proscribes any conduct that has same effect as specific acts enumerated in the first part of statute specifically forbidding influencing, intimidating or impeding any witness, juror or court official. 18 U.S.C.A. § 1503.

3. Obstructing Justice key 6

Defendants, who defied secrecy rule by selling transcripts of grand jury testimony, committed a contempt as defined in statute proscribing disobedience or resistance to a court rule and, since their contempt was perpetrated out of court, it fell within prohibitions of statute proscribing influencing, obstructing or impeding due administration of justice. 18 U.S.C.A. §§401, 1503; Fed. Rules Crim. Proc. rule 6(e), 18 U.S.C.A.

4. Criminal Law key 29

Conduct expressly covered by statute prohibiting influencing, obstructing or impeding due administration of justice may occur in view of the court and there is no reason to require summary contempt proceedings, pursuant to statute which authorizes summary punishment and which was confined to courtroom misconduct to curb judicial abuse of contempt power, when government wishes to proceed by indictment in such cases. 18 U.S.C.A. §§ 401, 1503.

5. Criminal Law key 13.1(2)

Given absence of any First Amendment consideration, defendants could not challenge statute prohibiting influencing, obstruction or impeding of due administration of justice as unconstitutionally vague on its face. 18 U.S.C.A. § 1503; U.S.C.A. Const. Amend. 1.

6. Criminal Law key 13.1(2)

Statute which prohibits influencing, obstruction or impeding of due administration of justice, which covers only conduct relating to pending judicial proceeding and then only if offending action was prompted at least in part by corrupt motive, is sufficiently clear and limited so as not to create a trap for the unwary. 18 U.S.C.A. § 1503.

7. Criminal Law key 13.1(2)

Since statutory omnibus clause prohibiting influencing, obstruction or impeding of due administration of justice clearly proclaims that all obstructions of justice are prohibited, statute gave defendants, who were convicted of conspiring to obstruct due administration of justice based on attempt to sell transcripts of secret grand jury testimony to persons under investigation for suspected federal banking law violations con-

stitutionally required fair notice of offending conduct. 18 U.S.C.A. § 1503.

8. Obstructing Justice key 6

Statute which does not forbid interference with doing "justice" in sense of "fairness" and "rightness," although undoubtedly it has effect to do so, but instead forbids interferences with the "administration of justice," is a contempt statute and as such is directed at disruptions of orderly procedure and thus whether defendants' action in selling transcripts of grand jury testimony had any ultimate effect on outcome of grand jury investigation was wholly irrelevant; question was whether they disturbed procedure of the investigation. 18 U.S.C.A. § 1503.

9. Conspiracy key 34

Grand jury investigation constituted requisite criminal proceeding for purposes of defendants' convictions of conspiring to obstruct the "due administration of justice," in connection with their attempt to sell transcripts of secret grand jury testimony, under statute which forbids interference with the administration of justice and which requires as a prerequisite a pending criminal proceeding. 18 U.S.C.A. § 1503.

Appeal from the United States District Court for the Middle District of Louisiana.

Before INGRAHAM, GEE and TJOFLAT, Circuit Judges.

Herbert Howard and Gary Ritter were convicted of conspiring to obstruct the "due administration of justice" under 18 U.S.C. § 1503. Their specific offense was an attempt to sell transcripts of secret grand jury testimony to persons under investigation for suspected violations of federal banking

laws. Aside from several minor contentions, which we will discuss later, defendants' various arguments on appeal boil down to the same complaint: that the statute under which they were charged and convicted does not cover the sale of grand jury testimony, or at least does not do so with the clarity demanded by the due process clause.

[1] Section 1503 can be divided into two parts: its specific language, which forbids the influencing, intimidation, or impeding of any witness, juror, or court official, and its concluding omnibus clause, which punishes the influencing, obstruction, or impeding of the due administration of justice.[1] Invoking *ejusdem generis*, defendants argue that the statute's specific language limits the omnibus clause so that "obstructing the due administration of justice" means influencing witnesses, jurors, and officials in ways other than, and similar to, those expressly enumerated in the first part of the section. Only one court has so applied *ejusdem generis* to section 1503, reading the omnibus clause to prohibit acts similar in manner to those prescribed by the statute's specific language. *See United States v. Metcalf*, 435 F.2d 754, 756-57 9th Cir. 1970).[2] We

1. Section 1503 is reprinted below, with the omnibus clause italicized.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice*, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. The *Metcalf* court limited § 1503 to "intimidating actions." 435 F.2d at 757. This cannot be a correct construction of the statute, for

cannot agree with this reading of the statute because it renders the omnibus clause superfluous, *see United States v. Walasek*, 527 F.2d 676, 679 & n.11 (3d Cir. 1975), and because the most natural construction of the clause is that it prohibits acts that are similar in result, rather than manner, to the conduct described in the first part of the statute.[3] Whatever can be

§ 1503 clearly covers attempts to silence witnesses through bribery as well as through coercion. *See United States v. DeAlesandro*, 361 F.2d 694, 699-700 (2d Cir.), *cert. denied*, 385 U.S. 842, 87 S.Ct. 94, 17 L.Ed.2d 74 (1966); *United States v. Medlin*, 353 F.2d 789 (6th Cir. 1965), *cert. denied*, 384 U.S. 973, 86 S.Ct. 1860, 16 L.Ed.2d 683 (1966); *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), *aff'd*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). In any event, *Metcalf's* limitation was unnecessary; the case involved an attempt to purchase a car bought with stolen loot. As the court itself admitted, 435 F.2d at 757, the defendant's actions did not relate to a pending judicial proceeding, which is a prerequisite of violating § 1503. *See United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975); *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972). *See also Pettibone v. United States*, 148 U.S. 197, 206, 13 S.Ct. 542, 37 L.Ed. 419 (1893); *United States v. Koehler*, 544 F.2d 1326 (5th Cir. 1977); *United States v. Baker*, 494 F.2d 1262, 1265 (6th Cir. 1974).

3. In four cases besides *Metcalf*, courts have applied *ejusdem generis* to § 1503, but none of the opinions in these cases elaborate upon the type of similarity required. For the most part, they simply state that the omnibus clause covers acts "similar" or "similar in nature" to those mentioned by the statute's specific language. *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972); *United States v. Essex*, 407 F.2d 214, 218 (6th Cir. 1969); *Haili v. United States*, 260 F.2d 744, 746 (9th Cir. 1958); *United States v. Knife*, 371 F.Supp. 1345, 1347 (D.S.D.1974); *United States v. Scoratow*, 137 F.Supp. 620, 621-22 (W.D.Pa. 1956). The opinion in *Haili* suggests concern with results rather than manner when it notes that § 1503 "'is designed to protect witnesses in Federal courts and also to prevent a miscarriage of Justice by corrupt methods.'" 260 F.2d at 746, *quoting Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949).

In all of the cases cited above, the courts found no violation of § 1503. *Haili*, *Knife* and *Scoratow* did not involve borderline facts but concerned, respectively, conduct causing a parole violation, an attempt to obtain a prisoner's release by threatening a policeman, and interference with an FBI investigation. The courts in *Essex* and *Ryan* arguably dealt with close cases: simple perjury and destruction of evidence. The *ratio decidendi of Essex* was that simple perjury is not a contempt offense, while § 1503 covers only contempts; and *Ryan* held merely that the prosecution had failed both to establish intent and to prove that the destroyed documents were relevant to the pending grand jury investigation. *See United States v. Virie*, 532 F.2d 1277, 1278 (9th Cir. 1976). The question posed in *Essex*, whether simple perjury contravenes § 1503, remains open in this circuit. *See United States v. Partin*, 552 F.2d 621, 630-31 (5th Cir.), *cert. denied*, —— U.S. ——, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). As to the destruction of evidence, several courts have held it forbidden by § 1503. See cases cited note 5 *infra*.

In *United States v. Knife* the court stated in dictum that destruction of evidence is prohibited by the omnibus clause. 371 F.Supp. at 1346. This demonstrates that applying *ejusdem generis* does not necessarily yield the restrictive reading urged by defendants.

accomplished through intimidating or influencing a witness, juror, or court official is labeled by section 1503 as an obstruction of justice, for the reason that each of these actors has certain duties imposed by law, and the interference with his performance of these duties necessarily disrupts the processes of the criminal justice system.[4] Crucial to an understanding of the instant case is the realization that this same interference can occur despite the absence of any personal contact with a juror, witness, or official. For example, persons violate section 1503 when they destroy evidence relevant to a judicial proceeding,[5] which demonstrates that the statute is concerned not only with protecting witnesses, jurors, and court officials but also with preventing "miscarriage[s] of Justice." *Samples v. United States*, 121 F.2d 263, 265 (5th Cir.), *cert. denied*, 314 U.S. 662, 62 S.Ct. 129, 86 L.Ed. 530 (1941). *See* note 3 *supra*. Using threats to prevent a grand jury witness from testifying has the result of destroying evidence; so does the burning of transcripts of that testimony, and both acts obstruct the administration of justice. The use of threats against a witness falls under the specific language of section 1503, while the destruction of documents comes under the omnibus clause.

Ample authority supports our reading of the statute. Language in *United States v. Partin*, 552 F.2d 621, 631 (5th Cir.), *cert. denied*, —— U.S. ——, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977), suggests that the specific wording of section 1503

4. We are using the terms "administration of justice" according to the definition we approved in *United States v. Partin*, 552 F.2d 621, 641 (5th Cir.), *cert. denied*, —— U.S. ——, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977), i.e., "the performance of acts required by law in the discharge of duties such as appearing as a witness and giving truthful testimony when subpoenaed."

5. *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975); *United States v. Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833, 95 S.Ct. 58, 42 L.Ed.2d 59 (1974); *Bosselman v. United States*, 239 F. 82 (2d Cir 1917); *United States v. Knife*, 371 F.Supp. 1345, 1346 (D.S.D. 1974)(dictum; the court applied *ejusdem generis* to § 1503); *United States v. Siegel*, 152 F.Supp. 370 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 530 (2d Cir.), *cert. denied*, 359 U.S. 1012, 79 S.Ct. 1147, 3 L.Ed.2d 1035 (1959); *United States v. Solow*, 138 F.Supp. 812 (S.D.N.Y. 1956).

was intended to forbid certain means of obstructing justice, while the omnibus clause aims at obstruction of justice itself, regardless of the means used to reach that result.[6] *Accord United States v. Siegel*, 152 F.Supp. 370, 373 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 530 (2d Cir.), *cert. denied*, 359 U.S. 1012, 79 S. Ct. 1147, 3 L.Ed.2d 1035 (1959). Similarly, in *Cole v. United States*, 329 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954, 84 S.Ct. 1630, 12 L.Ed.2d 497 (1964), the court quoted with approval the following statement from the appellant's brief: " 'the limitation on the literal language of the statute [18 U.S.C. § 1503] must be that only that is proscribed which produces or which is capable of producing an effect that prevents justice from being duly administered.' " 329 F.2d at 439 (emphasis deleted). Moreover, numerous cases have interpreted section 1503 as covering all interferences with the administration of justice regardless of the means employed. *United States v. Walasek*, 527 F.2d at 681, *quoting United States v. Solow*, 138 F.Supp. 812, 814 (S.D.N.Y. 1956); *United States v. Cohn*, 452 F.2d 881, 882-83 (2d Cir. 1971), *cert. denied*, 405 U.S. 975, 92 S.Ct. 1196, 31 L.Ed.2d 249 (1972); *Falk v. United States*, 370 F.2d 472, 476 (9th Cir. 1966), *cert. denied*, 387 U.S. 926, 87 S.Ct. 2044, 18 L.Ed.2d 982 (1967); *Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949); *United States v. Rosner*, 352 F.Supp. 915, 919 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672 (1974) (holding attempt to obtain secret grand jury documents covered by section 1503). *Accord United*

6. The *Partin* court stated as follows:

> [O]ne who endeavors to induce another to commit perjury . . . violate[s] the "due administration" clause. It is plain that the object of the conspiracies charged *was* to obstruct the due administration of the Houston trial and the Baton Rouge grand jury proceeding. The means allegedly chosen—inducing Baker to give false testimony—may well have violated the more specific first clause of § 1503. But we do not think that would prevent the endeavor from violating the broader "due administration" clause as well; for as we have said that clause "is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice."

552 F.2d at 631 (citation and footnote omitted; emphasis in original), *quoting Samples v. United States*, 121 F.2d 263, 266 (5th Cir.), *cert denied*, 314 U.S. 662, 62 S.Ct. 129, 86 L.Ed. 530 (1941).

States v. Carlson, 547 F.2d 1346, 1359 n.13 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977) (stating that section 1503 proscribes "the directing of threats against witnesses or otherwise impeding the administration of justice").

[2)] Applying our interpretation of section 1503 to the instant case, we observe that the statute clearly forbids one to bribe or to coerce a judge into ordering disclosure of secret grand jury testimony.[7] To do so would constitute an interference with the performance of a duty imposed upon the judge by Rule 6(e) of the Federal Rules of Criminal Procedure, which dictates the secrecy of grand jury proceedings. The important reasons for enforcing this secrecy have been stated often:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6,

7. If Howard had threatened or bribed Ritter, the court reporter, into disclosing the testimony, his action would have fallen under the specific language of § 1503 because a court reporter is an officer of the court, 82 C.J.S. *Stenographers* § 1 (1953); *see Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Stewart v. Minnick*, 409 F.2d 826 9th Cir. 1969), charged with the duty of maintaining the secrecy of grand jury proceedings, *see* Fed.R. Crim.P. 6(e). The facts of this case, however, were not developed with a view toward convicting Howard for influencing a court reporter, perhaps there was no evidence on that score, or perhaps Ritter needed no encouragement.

78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958); *quoting United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954). *Accord Posey v. United States*, 416 F.2d 545, 557 (5th Cir. 1969), *cert. denied*, 397 U.S. 946, 90 S.Ct. 965, 25 L.Ed.2d 127 (1970); I C. Wright, Federal Practice & Procedure: Criminal § 106, at 170 (1969). If bribing a judge to disclose secret grand jury material constitutes an obstruction of justice, then so does appropriation and disclosure of that material, for the result is the same, the secrecy of the proceeding is breached. The accomplishment of this result through threats or bribes falls within the specific language of section 1503, while violating the secrecy of the proceeding by selling the confidential matter comes under the omnibus clause, which proscribes any conduct that has the same effect as the specific acts enumerated in the first part of section 1503.

[3, 4] Our interpretation of section 1503 as applied to this case is confirmed by legislative history. Section 1503 originated as the second section of the Act of March 2, 1831, 4 Stat. 487. The first section of that Act is now 18 U.S.C. § 401. The purpose of the entire Act was to punish various conduct committed in contempt of court; present section 401 was intended to cover contempts that occurred within the court's presence, while present section 1503 was aimed at out-of-court contempts. *United States v. Harris*, 558 F.2d 366, 368 (7th Cir. 1977); *United States v. Walasek*, 527 F.2d at 680; *United States v. Essex*, 407 F.2d 214, 216-17 (6th Cir. 1969). In its current form, section 401 proscribes *disobedience or resistance to a court rule such as Rule* 6(e), which requires grand jury proceedings to be secret. Since Howard and Ritter defied Rule 6(e) by selling the transcripts, they committed a contempt as defined by section 401, *see United States v. Friedman*, 445 F.2d 1076, 1078 (9th Cir.), *cert. denied*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971) (indictment and conviction under section 401 for possessing and disclosing unreleased grand jury transcripts); and since their contempt was perpetrated out of court, it falls within the prohibitions of

section 1503. *See Nye v. United States*, 313 U.S. 33, 48-49, 61 S.Ct. 810, 85 L.Ed. 1172 (1941).[8]

[5-7] If the key to the meaning of section 1503 were embedded in the legislative history just discussed, we would tend to agree with the defendants' claim that the statute, as applied to them, is unconstitutionally vague.[9] The legislative history, however, serves merely to confirm the natural construction of the statute, upon which we elaborated earlier. At the very least, Howard and Ritter must have known that they could not influence an official to release the transcripts and, for that reason, must have recognized that to breach the secrecy of the grand jury proceeding would constitute an obstruction of justice under section 1503. Since the omnibus clause of the statute quite clearly proclaims that all obstructions of justice are prohibited, we conclude that section 1503

8. Section 401 authorizes summary punishments for contempts, while § 1503 requires indictment and trial. Congress confined the former section to courtroom misconduct in order to curb judicial abuse of the contempt power. *Nye v. United States*, 313 U.S. 33, 43-48, 61 S.Ct. 810, 85 L.Ed. 1172 (1941). Nonetheless, the two statutes often overlap. Conduct expressly covered by § 1503 may occur in view of the court, *see Pettibone v. United States*, 148 U.S. 197, 206, 13 S.Ct. 542, 37 L.Ed. 419 (1893); *Ex parte Savin*, 131 U.S. 267, 275, 9 S.Ct. 699, 33 L.Ed. 150 (1889), and there is no reason to require summary contempt proceedings when the government wishes to proceed by indictment, *see United States v. Harris*, 558 F.2d 366, 368 (7th Cir. 1977); *United States v. Walasek*, 527 F.2d 676, 680 (3d Cir. 1975); *United States v. Friedman*, 445 F.2d 1076, 1078 (9th Cir.), *cert. denied*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971) (offense under § 401 charged by indictment).

9. We need examine the statute's clarity only as applied to the facts of this case. Given the absence of any first amendment considerations, defendants cannot challenge § 1503 as unconstitutionally vague on its face. *See United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

Nonetheless, we wish to note that our interpretation of the omnibus clause does not create a trap for the unwary. *The statute covers only conduct that is related to a pending judicial proceeding*, *see* note 2 *supra* and then only if the offending action was prompted, at least in part, by a "corrupt" motive, *see United States v. Fayer*, 523 F.2d 661, 663-64 (2d Cir. 1975). Although Howard and Ritter criticize "obstruction of justice" as a vague term, the statute actually proscribes "obstruct[ing] . . . the due administration of justice," which means interfering with the procedure of a judicial hearing or trial.

We think the statutory language is sufficiently clear and limited. If anyone unwittingly runs afoul of § 1503, it will not be on account of a misconstruction but because of an ignorance for which there is no excuse.

gives "fair notice of the offending conduct" in this case, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972), which is all the constitution requires, *see Rowan v. United States Post Office Department*, 397 U.S. 728, 740, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); *United States v. Harriss*, 347 U.S. 612, 617-18, 74 S.Ct. 808, 98 L.Ed. 989 (1954). *Accord Anderson v. United States*, 215 F.2d 84 (6th Cir.), *cert. denied*, 348 U.S. 888, 75 S.Ct. 208, 99 L.Ed. 698 (1954) (upholding section 1503 against challenge for vagueness).

[8] We now turn to defendants' lesser arguments, two of which overlap. First, Howard and Ritter claim that their actions did not affect the outcome of the grand jury investigation. This claim is meaningless, not only because success is irrelevant under section 1503, *see United States v. Russell*, 255 U.S. 138, 143, 41 S.Ct. 260, 65 L.Ed. 553 (1921); *United States v. Roe*, 529 F.2d 629, 632 (4th Cir. 1975); *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), *cert. denied*, 419 U.S. 917, 95 S.Ct. 195, 42 L.Ed.2d 155 (1974), but also because defendants are misreading the statute. Section 1503 does not forbid interferences with doing "justice," in the sense of "fairness" and "rightness," although undoubtedly it has an effect to do so. Instead, it forbids interferences with the "administration of justice," which means judicial procedure. *See United States v. Partin*, 552 F.2d at 641; *United States v. McLeod*, 119 F. 416, 418 (C.C.N.D.Ala. 1902). Section 1503 is a contempt statute, *United States v. Walasek*, 527 F.2d at 680; *United States v. Essex*, 407 F.2d at 218, and as such is directed at disruptions of orderly procedure. Thus, it is wholly irrelevant whether defendants' actions had any ultimate effect on the outcome of the grand jury investigation: the question is whether they disturbed the procedure of the investigation.[10] Howard and Ritter next claim that their case is

10. The statute by its terms protects witnesses, jurors, and court officials even after they have performed the duties imposed on them by law. This clearly shows that § 1503 is concerned with more than the outcome of a judicial proceeding in a particular case.

controlled by *Ethridge v. United States*, 258 F.2d 234 (9th Cir. 1958), and *United States v. Campbell*, 350 F.Supp. 213 (W.D.Pa.1972), in both of which cases convictions under section 1503 were reversed on the ground that the defendants had merely attempted "shakedowns," that is, they had no intention of carrying out the obstruction of justice they promised to perform for pay. One can readily see the distinction between these two cases and the instant one. Howard and Ritter not only promised to deliver the transcripts, they actually carried out their promise.

[9] Defendants' final contention disregards clear authority. Because section 1503 forbids interference with the "administration of justice," a prerequisite of its violation is a pending criminal proceeding. *United States v. Walasek*, 527 F.2d at 678; *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972). *See Pettibone v. United States*, 148 U.S. 197, 206, 13 S.Ct. 542, 37 L.Ed.2d 419 (1893); *United States v. Koehler*, 544 F.2d 1326 (5th Cir. 1977); *United States v. Baker*, 494 F.2d 1262, 1265 (6th Cir. 1974). Defendants argue that grand jury investigation is not a requisite criminal proceeding, but the case law instructs otherwise. *See United States v. Walasek*, 527 F.2d at 678; *United States v. Campanale*, 518 F.2d 352, 366 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976); *United States v. Marrionneaux*, 514 F.2d 1244, 1249 (5th Cir. 1975); *United States v. Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967). These cases are clearly correct because section 1503 specifically refers to grand jurors.

AFFIRMED.

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 77-5286

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ELMER GARY RITTER,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

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May 24, 1978

ON PETITION FOR REHEARING

Before INGRAHAM, GEE and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of appellant Ritter only, in the above entitled and numbered cause be and the same is hereby denied.

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 77-5286

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ELMER GARY RITTER,

Defendant-Appellant.

June 2, 1978

Appeal from the United States District Court for the Middle District of Louisiana

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ORDER:

The motion of APPELLANT, RITTER for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

No. 77-1801

Supreme Court, U.S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELMER GARY RITTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

ROBERT J. ERICKSON,
JAMES ROLAND DIFONZO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1801

ELMER GARY RITTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-33) is reported at 569 F. 2d 1331.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1978. A petition for rehearing was denied on May 24, 1978 (Pet. App. 34). The petition for a writ of certiorari was filed on June 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the obstruction of justice statute, 18 U.S.C. 1503, encompasses the selling of grand jury transcripts by petitioner, a court reporter, to subjects of the grand jury investigation.

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Louisiana, petitioner and co-defendant Herbert A. Howard were convicted of conspiracy to obstruct the due administration of justice, in violation of 18 U.S.C. 371 and 18 U.S.C. 1503, by offering to sell transcripts of secret grand jury testimony. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed the convictions in a comprehensive opinion upon which we rely (Pet. App. 21-33).

The facts developed at trial are undisputed. Petitioner was a certified court reporter employed to record testimony before the federal grand jury in Baton Rouge, Louisiana. In October 1976, co-defendant Howard, acting in concert with petitioner, contacted Jules and Roger LeBlanc through an intermediary and informed them that he had access to materials that would be of interest to them in view of the grand jury's investigation into their banking affairs. The LeBlancs notified the F.B.I. of this contact and agreed to assist in foiling the scheme. Petitioner and Howard thereafter met with the LeBlancs and agreed to sell them eight transcripts and a tape recording of secret grand jury testimony for $10,000. The LeBlancs also agreed to pay $1,000 a month, in advance, to Howard as petitioner's agent for future transcripts of testimony in connection with the same grand jury investigation. Immediately upon receiving $11,000 from the LeBlancs, petitioner and Howard were arrested (see Tr. 94-97).

ARGUMENT

The sole question presented is whether the obstruction of justice statute, 18 U.S.C. 1503, encompasses the selling of grand jury transcripts by a court reporter to subjects of

the grand jury investigation.[1] Specifically, petitioner argues that, under the principle of *ejusdem generis*, Section 1503 should be construed to reach only those persons who use threats, force, or similar means to obstruct the administration of justice and that the statute therefore was unconstitutionally vague as applied to him. To be sure, acts or threats of force that intimidate court officers, jurors, or witnesses or that affect the "due administration of justice" are proscribed by the statute. But the plain language of Section 1503 also punishes anyone who "*corruptly* * * * influences, obstructs, or impedes * * * the due administration of justice." The evidence at trial clearly showed that petitioner and Howard endeavored for pecuniary gain to sell secret grand jury materials to persons who were the subjects of a criminal investigation. Consequently, the court of appeals correctly held that petitioner's conduct constituted a conspiracy to obstruct justice.

Relying on *United States* v. *Metcalf*, 435 F. 2d 754, 757 (C.A. 9), petitioner suggests (Pet. 17) that, despite the clear statutory language, Section 1503's coverage should be limited to "intimidating actions." Such a narrow reading of the statute would be justified only if Congress had been concerned exclusively with "coercive" obstructions of justice. As the court of appeals noted (Pet. App. 30-31 and n. 8), however, the legislative history does not support that limitation. 18 U.S.C. 1503, together with 18 U.S.C. 401 (defining the power of federal courts to punish contempt), are derived from the Act of March 2, 1831, 4 Stat. 487, whose purpose was to proscribe various conduct committed in contempt of court. As presently codified, Section 401 covers contempts in the court's

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[1]Section 1503 is reprinted in both the petition (Pet. 3) and the court of appeals opinion (Pet. App. 25 n. 1).

presence, while Section 1503 deals with out-of-court obstructions. See *Nye* v. *United States*, 313 U.S. 33, 48-49. Thus, Section 1503 is designed to achieve the twin goals of protecting participants in judicial proceedings and preventing miscarriages of justice by corrupt methods. *Anderson* v. *United States*, 215 F. 2d 84, 88 (C.A. 6), certiorari denied *sub nom. Lewis* v. *United States*, 348 U.S. 888; *United States* v. *Metcalf*, *supra*, 435 F. 2d at 756.

Although there is language in *Metcalf* which suggests that "the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions," this statement was neither necessary to the resolution of that case[2] nor supported by any analysis. Both parts of Section 1503 refer to "[w]hoever corruptly, *or* by threats or force, or by any threatening letter or communication, endeavors to *influence*, intimidate, or impede * * *" the due administration of justice (emphasis added). The first part of Section 1503 is clearly aimed at situations where the protection of participants in court proceedings is in jeopardy; the second part of the statute is more broadly framed to protect the "due administration of justice." In other words, to restrict the reach of the "due administration" clause to instances where a court participant is threatened or forcibly intimidated would render the second part of the statute essentially meaningless. See *United States* v. *Alpers*, 338 U.S. 680, 682; *United States* v. *Walasek*, 527 F. 2d 676, 679 n. 11 (C.A. 3). It goes without saying that a "statute should be construed so that effect is given to *all* its provisions, so that *no* part will be inoperative or superfluous, void or

[2]The court in *Metcalf* (435 F. 2d at 557) held not only that there was a lack of evidence of coercion on the defendant's part, but also that the defendant's actions did not relate to a pending judicial proceeding, which is a requirement of Section 1503.

insignificant * * *" (emphasis added). Sutherland, *Statutory Construction* § 46.06 (4th ed. 1973).

Thus, as the court of appeals explained (Pet. App. 26-27; footnotes omitted):

> Whatever can be accomplished through intimidating or influencing a witness, juror, or court official is labeled by section 1503 as an obstruction of justice, for the reason that each of these actors has certain duties imposed by law, and the interference with his performance of these duties necessarily disrupts the processes of the criminal justice system. Crucial to an understanding of the instant case is the realization that this same interference can occur despite the absence of any personal contact with a juror, witness, or official. For example, persons violate section 1503 when they destroy evidence relevant to a judicial proceeding, which demonstrates that the statute is concerned not only with protecting witnesses, jurors, and court officials but also with preventing "miscarriage[s] of Justice." *Samples* v. *United States*, 121 F. 2d 263, 265 (5th Cir.), cert. denied, 314 U.S. 662, 62 S.Ct. 129, 86 L.Ed. 530 (1941). * * * Using threats to prevent a grand jury witness from testifying has the result of destroying evidence; so does the burning of transcripts of that testimony, and both acts obstruct the administration of justice. The use of threats against a witness falls under the specific language of section 1503, while the destruction of documents comes under the omnibus clause.

See also *United States* v. *Partin*, 552 F. 2d 621, 631 (C.A. 5), certiorari denied, 434 U.S. 903. So, too, it is well established that Section 1503 extends to obstructions of justice perpetrated through bribery, a form of non-coercive conduct. *United States* v. *DeAlesandro*, 361 F. 2d

694, 699 (C.A. 2), certiorari denied, 385 U.S. 842; *United States* v. *Medlin*, 353 F. 2d 789 (C.A. 6), certiorari denied, 384 U.S. 973; *United States* v. *Hoffa*, 349 F. 2d 20, 40 (C.A. 6), affirmed, 385 U.S. 293. See also *United States* v. *Walasek, supra*, 527 F. 2d at 679 n. 9.[3]

In sum, there is no sound reason for applying the principle of *ejusdem generis*—at least the application of that principle urged by petitioner[4]—to the statute involved here. *Ejusdem generis* serves only to "ascertain[] the correct meaning of words when there is uncertainty * * *" but "may not be used to defeat the obvious purpose of legislation." *United States* v. *Powell*, 423 U.S. 87, 91, quoting from *Gooch* v. *United States*, 297 U.S. 124, 128.

Finally, petitioner's contention that the reach of Section 1503's "due administration of justice" clause is impermissibly vague, as applied to his conduct, is equally unconvincing.[5] As the Court stated in *Jordan* v. *De*

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[3]Indeed, the continuing validity of the *Metcalf* dictum is open to question. See *United States* v. *Friedman*, 445 F. 2d 1076, 1078 (C.A. 9), certiorari denied *sub nom. Jacobs* v. *United States*, 404 U.S. 958 (affirming, albeit without discussion, the defendant's conviction for, *inter alia*, obstructing justice by obtaining and using unreleased grand jury transcripts).

[4]Petitioner refers (Pet. 13-14) to the elaboration of *ejusdem generis* principles in *Haili* v. *United States*, 260 F. 2d 744 (C.A. 9); *United States* v. *Essex*, 407 F. 2d 214 (C.A. 6); *United States* v. *Ryan*, 455 F. 2d 728 (C.A. 9); and *United States* v. *Knife*, 371 F. Supp. 1345 (D. S.D.). However, as the court of appeals' discussion shows (Pet. App. 26 n. 3), these cases are each distinguishable and may be read as holding only that the "due administration of justice" clause prohibits acts designed to bring about evils "similar" or "similar in nature" to those prohibited by the statute's specific language. Petitioner's conduct, in breaching the secrecy of the grand jury, tended to produce the same result in terms of obstructing justice as if he had bribed a grand juror for the same information, conduct that certainly would be within the scope of Section 1503.

[5]As the court below pointed out (Pet. App. 31 n. 9), since petitioner's vagueness challenge does not involve any First

George, 341 U.S. 223, 231-232, whenever statutory "language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," the statute passes constitutional muster. Petitioner concedes that the unauthorized disclosure of grand jury proceedings is within the obvious intendment of the statute if violence or intimidation is used to obtain this end. No different result is required if the unauthorized disclosure of the same materials occurs by "corrupt" means, including sale by a person in breach of a known duty of secrecy. See Fed. R. Crim. P. 6(e). There can be no doubt that petitioner's attempted sale of grand jury transcripts to subjects of the investigation tended seriously to obstruct the accomplishment of the grand jury's important functions and to disrupt the orderly procedures of the criminal justice system. See *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681-682 and n. 6; 1 Wright, *Federal Practice & Procedure* § 106, p. 171 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

ROBERT J. ERICKSON,
JAMES ROLAND DIFONZO,
Attorneys.

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Amendment considerations it need only be examined in light of the facts of the case at hand. See *United States* v. *Powell, supra*, 423 U.S. at 92; *Rose* v. *Locke*, 423 U.S. 48, 50 n. 3; *Parker* v. *Levy*, 417 U.S. 733, 759.

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